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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 UNITED STATES OF AMERICA,
10 Plaintiff,
11 v.
12 PEDRO RODRIGUEZ GARCIA,
13 Defendant.

14 NO. CR-09-6093-EFS

15 ORDER GRANTING DEFENDANT'S
16 MOTION TO DISMISS AND DENYING
17 AS MOOT DEFENDANT'S DISCOVERY
18 MOTION

19 A pretrial conference occurred in the above-captioned matter on
20 March 11, 2010, in Richland. Defendant Pedro Rodriguez Garcia was
21 present, represented by Nicholas Marchi. Assistant United States
22 Attorney Alexander Ekstrom appeared on the United States' behalf. Before
23 the Court were Defendant's Motion to Dismiss Indictment (Ct. Rec. [46](#)) and
24 Defendant's Request for Discovery and Inspection Pursuant to Fed. R.
25 Crim. P. 16 (Ct. Rec. [33](#)). After reviewing the submitted material and
26 relevant authority and hearing from counsel, the Court is fully informed.
This Order memorializes and supplements the Court's oral dismissal of the
Indictment.

27 **A. Defendant's Motion to Dismiss Indictment**

28 Mr. Garcia asks the Court to dismiss the Indictment because the
29 underlying removal order is invalid given that the immigration judge

1 erroneously determined that Mr. Garcia was an aggravated felon based on
2 his drug possession conviction, a determination that prejudiced Mr.
3 Garcia. The Government concedes that under current Ninth Circuit case
4 law, *United States v. Cazarez-Gutierrez*, 382 F.3d 905, 910 (9th Cir.
5 2004), the immigration judge's aggravated-felony decision was erroneous,
6 but the Government submits that *Cazarez-Gutierrez* should not apply
7 retroactively because at the time the immigration judge made his decision
8 the law regarding what state drug crimes qualified as aggravated felonies
9 was unsettled.

10 1. Background

11 On February 19, 1991, Mr. Garcia was convicted of Unlawful
12 Possession of a Controlled Substance in Washington state court. More
13 than ten years later, in 2003, Mr. Garcia was served with a notice
14 setting an immigration removal hearing. On March 10, 2003, the
15 immigration judge ruled that Mr. Garcia's state conviction was an
16 aggravated felony and therefore ordered him removed. Mr. Garcia was
17 removed on March 11, 2003.

18 Mr. Garcia returned to the United States and was charged with the
19 instant Indictment on February 8, 2010, charging illegal reentry in
20 violation of 8 U.S.C. § 1326.

21 2. Authority and Analysis

22 The existence of a prior removal order is a predicate element in a
23 § 1326 illegal reentry offense. Therefore, a defendant charged with this
24 offense may collaterally attack the underlying removal order by
25 establishing: 1) that he exhausted any administrative remedies that were
26 available to seek relief against the order; 2) improper deprivation of

1 the opportunity for judicial review; and 3) that the entry of the
2 deportation order was fundamentally unfair. *United States v. Camacho-*
3 *Lopez*, 450 F.3d 928, 929 (9th Cir. 2006) (citing 8 U.S.C. § 1326(d)).

4 The Court starts with the last requirement: fundamental unfairness.
5 A deportation order is "fundamentally unfair" if 1) the alien's due
6 process rights were violated during the underlying deportation proceeding
7 and 2) he suffered prejudice as a result. *United States v. Zarate-*
8 *Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998); see also *United States v.*
9 *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004).

10 In 1991, when the immigration judge determined that Mr. Garcia's
11 state drug possession conviction was an aggravated felony, the Ninth
12 Circuit had not yet clarified what state drug felonies qualified as
13 aggravated felonies for deportation purposes. The Ninth Circuit
14 clarified this issue in *Cazarez-Gutierrez*, ruling that a state felony
15 drug offense qualified as an aggravated felony if it a) was punishable
16 as a felony under federal drug laws or b) contained a trafficking
17 element. 382 F.3d at 912. It is undisputed that Mr. Garcia's state drug
18 possession offense was not punishable as a felony under federal drug laws
19 and did not contain a trafficking element. Therefore, under *Cazarez-*
20 *Gutierrez*, Mr. Garcia's state drug possession conviction is not an
21 aggravated felony. The parties disagree as to the consequence of the
22 immigration judge's erroneous (in light of *Cazarez-Gutierrez*) aggravated-
23 felony finding.

24 The Court concludes that *Cazarez-Gutierrez*, which is a substantive
25 interpretation of "aggravated felony," applies retroactively to Mr.
26 Garcia's deportation proceeding. See *United States v. Camacho-Lopez*, 450

1 F.3d 928 (9th Cir. 2006) (applying subsequent Supreme Court decision,
2 which defined "crime of violence," to prior removal order); *United States*
3 v. *Ponce*, No. 08cr3239WQH, 2009 WL 1212731 (S.D. Cal. May 4, 2009)
4 (applying *Cazarez-Gutierrez* retroactively and determining that
5 immigration judge erroneously determined that state drug possession
6 conviction was an aggravated felony). This is because the underlying
7 removal order serves as a predicate element of the § 1326 charge.
8 Accordingly, Mr. Garcia's due process rights were violated when the
9 immigration judge determined he was an aggravated felon.

10 Notwithstanding this due process violation, Mr. Garcia must show
11 that he suffered prejudice as a result. See *United States v. Pallares-*
12 *Galan*, 359 F.3d 1088, 1104 (9th Cir. 2004). The immigration proceeding
13 notice stated: "You were on 02/19/91, convicted in the Washington State
14 Superior Court at Franklin County, Washington for the offense of Unlawful
15 Possession of a Controlled Substance, Cocaine, in violation of RCW
16 69.50.401(d);" the notice did not mention any other conviction. Because
17 the 1991 drug possession conviction served as the sole basis for removal,
18 Mr. Garcia was prejudiced by the immigration judge's failure to apprise
19 Mr. Garcia of possible relief from deportation: a failure resulting from
20 the immigration judge's erroneous aggravated-felony determination. See
21 *Camacho-Lopez*, 450 F.3d at 930 ("Camacho's Notice to Appear charged him
22 as removable only for having committed an aggravated felony; as discussed
23 above, Camacho's prior conviction did not fit that definition. Thus,
24 Camacho was removed when he should not have been and clearly suffered
25 prejudice.").

26

1 In sum, Mr. Garcia established that the prior removal order was
 2 fundamentally unfair. He also satisfies the two other collateral attack
 3 requirements: 1) he was improperly denied the opportunity to obtain
 4 judicial review because he was not advised of the possibility of
 5 obtaining relief from deportation and therefore his waiver of his right
 6 to appeal was not considered and intelligent, *see United States v.*
 7 *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000); and 2) he is exempt from
 8 the administrative exhaustion requirement because he brought a due
 9 process challenge, *see Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th
 10 Cir. 2005). Accordingly, Mr. Garcia's March 10, 2003, removal order may
 11 not support an 8 U.S.C. § 1326 offense; the Indictment is dismissed.

12 **B. Conclusion**

13 For the reasons given above, **IT IS HEREBY ORDERED:**

14 1. Defendant's Motion to Dismiss Indictment (**Ct. Rec. 46**) is
 15 **GRANTED**.

16 2. Defendant's Request for Discovery and Inspection Pursuant to Fed.
 17 R. Crim. P. 16 (**Ct. Rec. 33**) is **DENIED AS MOOT**.

18 3. Defendant is to be **RELEASED**.

19 4. The March 22, 2010 trial is **STRICKEN**.

20 **IT IS SO ORDERED.** The District Court Executive is directed to enter
 21 this Order and to provide copies to all counsel, the U.S. Probation
 22 Office, the U.S. Marshal, and the Jury Administrator.

23 **DATED** this 12th day of March 2010.

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S/ Edward F. Shea

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EDWARD F. SHEA

United States District Judge

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